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RIGHT OF EMPLOYER AND INSURER TO SUBROGATION UNDER THE WORKMEN'S COMPENSATION ACTS AGAINST A THIRD PERSON CAUSING INJURY TO AN EMPLOYEE.—Practically all of the Workmen's Compensation Laws in force in our various States allow an employee injured by the negligence of a third person, to choose either his common law right of action against such third person or to proceed against the employer for compensation. If he elects to proceed against the employer, and recovers damages, the employer is thereby subrogated to any claim that the employee may have against a third party legally liable for the injury, for such amount as the employer has been compelled to pay.[1] And this has been held to be true even where the employer was guilty of contributory negligence.[2]

In some States this subrogation is merely by the terms of the statute,[3] while in others the statutes provide that the making of a claim against an employer for compensation shall operate as an assignment of the cause of action.[4] In some jurisdictions it is required that the cause of action be formally assigned by the employee if he wishes to claim compensation.[5]

Here it is interesting to digress and note that the claim assigned must be one that the employee could prosecute. Thus, where a statute gives an action for death by wrongful act to the personal representatives of the deceased only, the *application for compensation* by a person entitled thereto *as being the next of kin* does not work an assignment of the action.[6] Nor does the prosecution of an action for wrongful death by the *personal representative* of a deceased employee operate as an election so as to bar the *next of kin* from claiming compensation, when the Workmen's Compensation Act requires that the *person entitled to compensation* must choose between a claim under the act against an employer or an action against a third person liable for the injury.[7]

To return to the topic—a recent decision in Kentucky is worthy of note and comment, since it refused subrogation to the employer. The statute gave to an employer "having paid the compensation or

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[1] Albert Albrecht Co. *v.* Whitehead, 200 Mich. 109, 166 N. W. 855 (1918); U. S. Fidelity and Guaranty Co. *v.* N. Y. Rys. Co., 156 N. Y. S. 615 (1916); Miller *v.* N. Y. Rys. Co., 157 N. Y. S. 200 (1916); Marshall-Jackson Co. *v.* Jeffery, 167 Wis. 63, 166 N. W. 647 (1918); Muncaster *v.* Graham Ice Cream Co. (Neb.), 172 N. W. 52 (1919); Thomas *v.* Otis Elevator Co. (Neb.), 172 N. W. 53 (1919); Moreno *v.* Los Angles Transfer Co. (Cal.), 186 Pac. 800 (1920).

[2] Otis Elevator Co. *v.* Miller and Paine, 240 Fed. 376 (1917).

[3] Albert Albrecht Co. *v.* Whitehead, *supra;* Otis Elevator Co. *v.* Miller & Paine, *supra;* Marshall-Jackson Co. *v.* Jeffery, *supra.*

[4] Anderson *v.* Miller Scrap Iron Co. (Wis.), 182 N. W. 852 (1921).

[5] U. S. Fidelity and Guaranty Co. *v.* N. Y. Rys. Co., *supra;* Miller *v.* N. Y. Rys. Co., *supra.*

[6] Anderson *v.* Miller Scrap Iron Co., *supra;* Travellers Ins. Co. *v.* Louis Padula Inc., 170 N. Y. S. 869 (1918).

[7] Miller Scrap Iron Co. *v.* Industrial Commission (Wis.), 180 N. W. 826 (1921).

having become liable therefor" the right to recover from a negligent third party damages not to exceed the amount of the award. In construing this the court held in *Henderson, etc., Co.* v. *Owensboro, etc., Co.*,[8] that an employer who was insured, so that the insurance carrier paid the amount of the award to an injured employee, could not maintain an action against the negligent third party responsible for the loss. The reason given was that the employer being insured never *obligated himself* to pay. The court throughout the opinion used the word "obligated", whereas the statute used the phrase "having become liable". It is easy to see that the employer might have become liable without obligating himself. It is difficult to see how any employer could become liable to pay within the meaning of the act, if the granting to an employee of an award against his employer is not sufficient. In this case the commission created by the act gave the injured employee an award. The decision was probably due to the court's substitution of "obligated" for the words of the statute. Certainly, six weeks before this case, the Vermont court decided in favor of the employer under facts identical with the above, and under a statute giving the right of subrogation to an employer "having paid compensation or having become liable therefor."[9] Justice to the Kentucky court compels it to be said that in the Vermont case the defendant did not raise the point that the employer had not "become liable". But, on the other hand, under a slightly different statute it has been held that the Act itself, and not any transaction arising out of it, was the basis of the employer's liability.[10]

However, the Kentucky court in the Henderson Case, *supra*, went further and dismissed the petition as to the insurance carrier, who was a joint plaintiff, on the grounds that in the absence of statute it was not entitled to subrogation. This is in accord with the trend of the authority. Various reasons are given by different courts. The case under discussion was based on the theory that the insurance company had no equity entitling it to claim subrogation. The court said:

> "The employer in conjunction with many others pays to the insurance company a sum larger than that which is required to satisfy all such claims for indemnity, and the insurance company only appropriates from such fund such part as is necessary in the given case to satisfy the award. It has lost nothing whatever. In fact, it has applied a part, only, of a common fund to the satisfaction of an award which it undertook, in consideraion of the deposit of such fund and the profits to be derived therefrom, to satisfy."

The usual grounds for denying an equitable right of subrogation to Employers' Liability Insurance carrier is that the nature of the

[8] (Ky.), 233 S. W. 743 (1921).
[9] Davis *v.* Central Vermont Ry. Co. (Vt.), 113 Atl. 539 (1921).
[10] Moreno *v.* Los Angeles Transfer Co., *supra*.

insurance is not indemnity, as in fire insurance, but rather an investment contract, as in the case of accident and life insurance.[11]

However, in the case of Workmen's Compensation Acts, it is seldom left to the insurer to seek subrogation on equitable grounds, as the right is usually given in a purely arbitrary manner by statute.[12] But in interpreting these statutes, the courts differ as to how far the principles of equitable subrogation are adopted into the new laws. One case has held that even under such a statute, an insurer is not entitled to recover until he has paid the entire amount of the liability, although part of it be not yet due,[13] thus applying the principles of equitable subrogation; while another case declares that the right of an insurer to enforce for its benefit the liability of a tort feasor is purely statutory and does not depend in any way on a theory of subrogation.[14] It is to be noted that the statute under consideration in this latter case was worded so as to avoid the use of the usual term "subrogation."

B. C.

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[11] Gatzweiler *v.* Milwaukee Electric Co., 136 Wis. 34, 116 N. W. 633, 18 L. R. A. (N. S.) 211, 128 Am. St. Rep. 1057, 16 Ann. Cas. 633 (1908); Marshall-Jackson Co. *v.* Jeffery, *supra;* Aetna Life Ins. Co. *v.* Parker, 96 Tex. 287, 72 S. W. 168, 621 (1903); Suttles *v.* Railway Mail Ass'n, 141 N. Y. S. 1024 (1913); Aetna Life Ins. Co. *v.* Otis Elevator Co. (Cal.), 204 S. W. 376 (1918).

[12] Turnquist *v.* Hannon, 219 Mass. 560, 107 N. E. 443 (1914); U. S. Fidelity and Guaranty Co. *v.* N. Y. Rys. Co., *supra;* Davis *v.* Central Vermont Ry. Co., *supra;* Wayburgh *v.* Somerset Tel. Co. (Pa.), 109 Atl. 213 (1920).

[13] Maryland Casualty Co. *v.* Cincinnati, etc., Ry. Co. (Ind.), 124 N. E. 774 (1919).

[14] Turnquist *v.* Hannon, *supra.*